In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1096

FRANK NADALINE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners claim they were impermissibly prejudiced by the failure of a juror and of the chief defense lawyer to reveal their acquaintanceship, and by the government's questioning of petitioner Smith concerning a prior conviction obtained when he was not represented by counsel.

A seven-count indictment returned in the United States District Court for the Southern District of Florida charged petitioners with having obstructed, delayed, and affected commerce through extortionate means and with conspiring to commit the substantive offenses, in violation of 18 U.S.C. 1951 and 371. After a jury trial, each was convicted on the conspiracy count and on one or more of the substantive counts.[1] Frank Nadaline was sentenced to

[1] Frank Nadaline was found guilty on two of the four substantive counts in which he was charged. Joseph Nadaline was found guilty

concurrent terms of four years' imprisonment, Joseph Nadaline to concurrent terms of three years' imprisonment, and Lawrence Leroy Smith to concurrent terms of one year's imprisonment. The court of appeals affirmed (Pet. App. 1a-14a).

The facts in this case are detailed in the comprehensive opinion below (Pet. App. 3a-6a). Briefly, the evidence at trial showed that Frank Nadaline, Joseph Nadaline, and Smith were respectively chairman of the board, division manager, and an employee of Harrison Fotochrome, which operated photofinishing plants in Florida and elsewhere. On January 12, 1971, Drive-In Cameras, Inc., a Florida competitor of Harrison, hired John Eggers, a former Harrison sales representative who controlled a number of accounts. On January 20, 1971, Frank and Joseph Nadaline visited John Bryan, the owner of Drive-In Cameras, and threatened to "work him over" unless he fired Eggers. On January 25, 1971, Frank and Joseph Nadaline assaulted Eggers. On January 26, 1971, Joseph Nadaline and Smith threw a rock through a window of Drive-In's office in Pompano Beach.

1. Petitioners' contention that one juror's non-disclosure of his acquaintance with the chief defense counsel deprived them of their right to an impartial jury was thoroughly considered and properly rejected by the court below (Pet. App. 8a-9a), upon whose opinion we rely. The court correctly held that in the absence of a *material* non-disclosure from which prejudice is readily inferable,

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on three of the four substantive counts in which he was charged. Lawrence Leroy Smith was found guilty on one of the two substantive counts in which he was charged. The specific offenses charged against each petitioner are described in the opinion below (Pet. App. 2a-3a).

"the party asserting such prejudice has the burden of proof" (Pet. App. 9a). The cases cited by petitioners do not conflict with the decision below; in each the inference of prejudice and partiality was compelling.[2] Here, there is only petitioners' speculation—contradicted by the juror's own testimony—that a casual acquaintanceship which even the defense lawyer thought not significant enough to mention *might* have prejudiced their substantial rights.

2. Petitioners also contend that they were impermissibly prejudiced by the prosecutor's questioning of petitioner Smith with respect to a prior felony conviction obtained when Smith was not represented by counsel. There was no objection to these questions at trial, and the record shows that they were intended, not to impeach Smith's credibility generally, but to rebut his specific statement on direct that he was not "a violent person" (Pet. App. 11a). The case is thus distinguishable from *Loper* v. *Beto*, 405 U.S. 473, relied on by petitioners, where this Court held it impermissible to impeach a defendant's credibility generally by the use of constitutionally invalid convictions. The plurality opinion in *Loper* expressly recognized that a different case would be presented where, as here, the prior conviction is used to rebut a specific statement made from the witness stand (405 U.S. at 482, n. 11).

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[2] In *Jackson* v. *United States*, 395 F. 2d 615 (C.A. D.C.), a juror failed to disclose that he had had an affair with the defendant's wife, whom the defendant was charged with having murdered. In *United States ex rel. Fletcher* v. *Cavell*, 287 F. 2d 792 (C.A. 3), a juror failed to reveal that he was the son-in-law of the investigating detective, a witness at the trial. In *United States ex rel. DeVita* v. *McCorkle*, 248 F. 2d 1 (C.A. 3), a juror failed to disclose that he had recently been robbed in circumstances nearly identical to those of the robbery which the defendants were alleged to have committed, and he falsely denied knowing any state police officers when in fact he was daily escorted by a team of officers from the same unit that had investigated the robbery at issue.

Moreover, as the court below held (Pet. App. 14a), it cannot be said here that the single mention of the one conviction was so prejudicial that it "might well have influenced the outcome of the case" (405 U.S. at 480). Petitioners' assertions that they *all* were prejudiced (Pet. 12 and n. *) are wholly speculative. Rather, the record here supports the determination by the court below (Pet. App. 14a) that the jury was sufficiently discriminating to understand the limited relevance of Smith's conviction; it found each petitioner not guilty of at least one of the charges against him.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.